

[Cite as *Sweeney v. Natl. Union Fire Ins. Co.*, 2004-Ohio-624.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
No. 82143

FRANCIS E. SWEENEY, JR.,
ADMINISTRATOR of the ESTATE
OF ALTON BENNETT, DECEASED

Plaintiff-Appellant

vs.

NATIONAL UNION FIRE INS. CO.,

Defendant-Appellee

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DATE OF ANNOUNCEMENT
OF DECISION

FEBRUARY 12, 2004

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CHARACTER OF PROCEEDING

:

Civil appeal from
Common Pleas Court
Case No. CV-450669

JUDGMENT

:

AFFIRMED

DATE OF JOURNALIZATION

:

APPEARANCES:

For Plaintiff-Appellant:

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For Defendant-Appellee:

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ANNE L. KILBANE, P.J.

{¶1} Francis E. Sweeney, Jr., administrator of the estate of Alton Bennett, deceased, appeals from an order of Judge Bridget McCafferty that granted summary judgment to National Union Fire Insurance Company ("National Union"), on the estate's claim for uninsured/underinsured motorist ("UM") coverage under two insurance policies issued to Bennett's employer, the LTV Corporation ("LTV").

The judge found that the policies were not required to offer UM coverage because each had deductible amounts equal to the amount of liability coverage provided. We affirm, but on other grounds.

{¶2} On March 23, 1996, Bennett was injured in a car accident caused by the negligence of Dawn Bisson, and on April 11, 1996, he died from those injuries. His estate accepted her insurance carrier's per person liability policy limit of \$12,500 and later sought to recover under two policies issued by National Union to LTV: a commercial automobile policy and a commercial general liability policy. The estate claimed that UM coverage arose by operation of law under each policy because National Union had failed to comply with the applicable version of R.C. 3937.18(C), which required each automobile liability insurance policy to provide a written offer and rejection of UM coverage if that

coverage was meant to be excluded.¹ Because of his employment status, the estate asserted its decedent was a UM insured under the LTV policies pursuant to *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.*,² although Bennett was not within the course and scope of his employment when the accident occurred.

{¶3} On November 8, 2002, the judge granted summary judgment to National Union on the ground that the policies were exempt from the requirements of R.C. 3937.18(C) because they were “fronting” policies that had matching deductible and coverage amounts, no offer or rejection of UM coverage was mandated and, therefore, that UM coverage did not arise by operation of law. Sweeney asserts three assignments of error, which are included in an appendix to this opinion.

{¶4} Although the judge ruled that the policies were exempt from the offer and rejection requirements of R.C. 3937.18(C) and *Gyori*, supra, we need not address the merits of that holding because we must affirm the judgment on other grounds.³ Under the Ohio Supreme Court’s recent decision in *Westfield Ins. Co. v.*

¹*Gyori v. Johnston Coca-Cola Bottling Group, Inc.*, 76 Ohio St.3d 565, 1996-Ohio-358, 669 N.E.2d 824, paragraph one of the syllabus; *Linko v. Indemn. Ins. Co. of N.Am.*, 90 Ohio St.3d 445, 449-450, 2000-Ohio-92, 739 N.E.2d 338.

²85 Ohio St.3d 660, 1999-Ohio-292, 710 N.E.2d 1116.

³*Joyce v. Gen. Motors Corp.* (1990), 49 Ohio St.3d 93, 96, 551 N.E.2d 172.

Galatis,⁴ Bennett does not qualify as a UM insured under either policy because, although an insured, his loss did not occur within the course and scope of his employment.⁵ Under the circumstances, UM coverage is precluded and we need not determine whether the policies are exempt from R.C. 3937.18.⁶ Therefore, the three assignments of error are overruled.

{¶5} The judgment is affirmed.

Judgment affirmed.

DIANE KARPINSKI and SEAN C. GALLAGHER, JJ., concur.

APPENDIX - ASSIGNMENTS OF ERROR

"I. THE TRIAL COURT ERRED IN DENYING PARTIAL SUMMARY JUDGMENT TO PLAINTIFFS-APPELLANTS, AND IN GRANTING DEFENDANT-APPELLEE, NATIONAL UNION FIRE INSURANCE COMPANY, SUMMARY JUDGMENT BECAUSE THE POLICIES ARE AMBIGUOUS AS A MATTER OF LAW."

"II. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING BOTH THE COMMERCIAL GENERAL LIABILITY POLICY RMGL 12161129 AND AUTOMOBILE POLICY RMCA 1352792 ARE FULL FRONTING POLICIES AND EXEMPT FROM OHIO'S UNINSURED/UNDERINSURED MOTORIST COVERAGE STATUTE, O.R.C. 3937.18."

"III. THE TRIAL COURT ERRED, AS A MATTER OF LAW, BY CONCLUDING THAT PLAINTIFFS WERE NOT ENTITLED TO UNINSURED/UNDERINSURED MOTORISTS COVERAGE PURSUANT TO THE

⁴100 Ohio St.3d 216, [2003-Ohio-5849](#), 797 N.E.2d 1256.

⁵Id., paragraph two of the syllabus.

⁶*Tucker v. Wilson*, 100 Ohio St.3d 360, [2003-Ohio-6742](#), 800 N.E.2d 355.

POLICIES THAT HAD BEEN ISSUED BY NATIONAL UNION FIRE INSURANCE TO ALTON BENNETT'S EMPLOYER, LTV CORPORATION."

It is ordered that appellee shall recover of appellant costs herein taxed.

The court finds that there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANNE L. KILBANE

PRESIDING JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc. App.R.22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E), unless a motion for reconsideration with supporting brief, per App.R. 26(A) is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).